BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Circuit Court of Appeals is, as yet, unreported. It will be found on page 100 of the Record.

JURISDICTION

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28, U.S.C.A. 347.

2. The judgment of the Circuit Court of Appeals was entered on April 15, 1943. No petition for rehearing was filed.

3. The nature of the case, the rulings of the Circuit Court of Appeals for the Sixth Circuit, and the reasons why a writ of certiorari should be granted are set forth in the foregoing petition.

4. The grounds upon which the writ is asked are two of the reasons set forth in Rule 38 5(b) of the Rules of your Honorable Court, as follows:

(a) The decision of the Circuit Court of Appeals decides important questions of Federal law which have not been, but should be settled by this Court, and

(b) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE AND QUESTION INVOLVED

The petition for the writ of certiorari contains a statement of the case and of the questions involved, as well as a statement of the facts material to their consideration. In the interest of brevity, the questions involved and material facts are not repeated here.

STATUTE INVOLVED

The statute involved is the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.A. 151. The pertinent sections are:

> Section 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employ-

ers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Section 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Section 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: PROVIDED, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Section 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power sall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such

person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency, conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the

Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in granting the petition of the National Labor Relations Board and in decreeing the enforcement of its order.

2. The Circuit Court of Appeals erred in not holding that the National Labor Relations Act does not regulate or attempt to regulate the acts and practices of a retailer of merchandise.

3. The Circuit Court of Appeals erred in not holding that, even if the Act does by its terms regulate a retailer, it does so only if and when the unfair labor practices of such retailer operate to burden or obstruct commerce, that is, lead or tend to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

4. The Circuit Court of Appeals erred in holding "that the mere fact that it (the Petitioner) is a retailer of merchandise, conducting business as it does," does not exempt Petitioner "from the coverage of the National Labor Relations Act."

5. The Circuit Court of Appeals erred in holding that the "findings of the Board were sufficient to sustain its cease and desist order."

6. The Circuit Court of Appeals erred in holding that it was not necessary, in order to sustain the jurisdiction of the Board, that the Board make findings that the Petitioner was engaged in unfair labor practices as defined in the Act, and that the practices of the Petitioner burdened or obstructed commerce or led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

7. The Circuit Court of Appeals erred in holding that the stipulation entered into between the parties waived the requirements of the Act that the Board make findings of fact, the particular findings here required being those upon which its jurisdiction must rest, that is, findings as to the existence of unfair labor practices and their effect on commerce as above described.

ARGUMENT

I. The decision of the Circuit Court of Appeals decided important questions of Federal law which have not been, but should be settled by this Court.

1. The Supreme Court has never passed upon the question as to whether the National Labor Relations Act provides a regulation, in respect to the matters set forth therein, of the business of the retailer, that is, the merchant retailing merchandise. It has never determined whether the words "industry", "industries", "industrial" and "industrial strife and unrest," as these words are used in the National Labor Relations Act, include or refer to the persons, firms, or corporations engaged in the business of retailing merchandise, that is, to the business commonly or ordinarily described as that of the retailer and the retail store.

2. The Supreme Court has never directly passed upon the question as to whether a given business, not being in commerce, but which, in the course of its operations, makes use of the channels and vehicles of interstate commerce, is within the ambit of the provisions of the National Labor Relations Act in respect to its labor practices solely on account of the relation of the business to commerce, although it does not appear that such practices either are in commerce, burden or obstruct commerce, or have led or tend to lead to a labor dispute burdening or obstructing commerce.

3. The Supreme Court has not passed on the question of whether the parties to a proceeding before the National Labor Relations Board upon a complaint charging unfair labor practices, can waive by stipulation the requirement of the National Labor Relations Act that the Board make findings supported by substantial evidence of the facts upon which rests its claim of jurisdiction.

4. The Supreme Court has not passed on the question of whether the parties to a proceeding before the National Labor Relations Board on a complaint charging unfair labor practices, by entering into a stipulation that in case the Board determines it has jurisdiction it may enter an order on the complaint, can by such stipulation waive the requirement of the Act that the Board make findings, supported by substantial evidence, of the facts determined by it.

These questions are presented on this record. They are important questions of Federal law and are of particular importance to the retailer and the retail business.

II. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

(a) The conclusion to be derived from the opinion of the Circuit Court of Appeals is that the test of the applicability of the National Labor Relations Act and of the jurisdiction of the National Labor Relations Board lies in the extent to which the business of a given respondent is in, makes use of, or affects interstate commerce, rather than in the existence of unfair labor practices and their effect on commerce.

In *National Labor Relations Board v. Fainblatt,* 306 U. S. 601, it was pointed out that the National Labor Relations Act evidenced the intention of Congress to exercise its power to regulate commerce

> "by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate com-commerce." (p. 607)

And again in the course of the opinion, it was said:

> "In this, as in every other case, the test of the Board's jurisdiction is not the volume of the interstate commerce which may be affected, but the existence of a relationship of the employer and his employees to the commerce such that, to paraphrase Sec. 10 (a) in the light of constitutional limitations, unfair labor practices have led or tended to lead 'to a labor dispute burdening or obstructing commerce'." (p. 608)

This was said in the course of a discussion of the question as to whether the volume of the business of respond-

ent, moving in interstate commerce, was sufficient to justify the exercise of the Board's jurisdiction, it having appeared that the Board found that strikes had occurred in the course of the respondent's operations and that they had been induced by the unfair labor practices. Nevertheless, it is clear that the Court was asserting that the test of jurisdiction was (1) the existence of unfair labor practices, and (2) the fact that they had "led or tended to lead" 'to a labor dispute burdening or obstructing commerce'."

In the *Jones & Laughlin Steel Corporation* case, 301 U. S. 1, and the cases which followed it, viz., *National Labor Relations Board v. Fruehauf Trailer Company*, 301 U. S. 49; *National Labor Relations Board v. Friedman-Harry Marks Clothing Company*, 301 U. S. 58; *Associated Press v. National Labor Relations Board*, 301 U. S. 103, and others, it was established that the employer had engaged in unfair labor practices. The question was then presented as to whether these practices had an effect to substantially burden commerce, or led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow thereof. To settle this question, the business activities of the employer were examined to determine whether they were so related to commerce that the labor practices would affect commerce to burden or obstruct it. But in none of these cases was the relation of the business to commerce the test of jurisdiction of the Board. That test was always the existence of the condemned practices and their effect on commerce. The business operations in commerce did not supply the test. They were only the link which tied the practices to commerce and so made possible the conclusion that they burdened or obstructed it, or led or tended to lead to a labor dispute which had that effect.

The order of the Board in the instant case was predicated upon the relation of the business of the Petitioner to commerce and not upon any proof of findings that the acts and practices of the Petitioner affected commerce or burdened or obstructed it, or its free flow, or had led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

The opinion of the Circuit Court of Appeals in this case ignores the necessity of either proofs or a finding of the effect of labor practices on commerce, and asserts that the Petitioner is subject to the Act by reason alone of the extent of its operations in commerce. In this the opinion of the Circuit Court of Appeals is at variance with the rule which was either explicitly or impliedly laid down by the Supreme Court in all of the cases above cited.

(b) The decision of the Circuit Court of Appeals, insofar as it holds that the findings as to the unfair labor practices of the Petitioner are in this case not necessary to sustain the jurisdiction of the National Labor Relations Board, is in probable conflict with applicable decisions of this Court.

The Petitioner contends that since the jurisdiction is dependent on the existence of labor practices affecting commerce in the manner and to the extent prescribed in the Act, findings as to the existence of such practices and their effect, immediate or otherwise, on commerce are necessary to sustain the Board's jurisdiction.

The Circuit Court of Appeals held that in view of the stipulation before the Board, such findings were not necessary. The Petitioner contends: (a) that the findings

are necessary in any event; (b) that they could not be waived by the parties; and (c) that the stipulation, reserving as it did, the question of jurisdiction, did not waive the requirement of findings as to the labor practices and their effect.

(a) The Supreme Court has uniformly held that administrative tribunals must make findings of the essential facts if their orders are to be sustained.

Wichita Railroad and Light Company v. Public Utilities Comm., 260 U. S. 48;

Mahler v. Eby, 264 U. S. 32;

Beaumont, Sour Lake & Western Ry. Co. v. United States, 282 U. S. 74, 86;

Florida v. United States, 282 U. S. 194;

Panama Refining Co. v. Ryan, 293 U. S. 388;

United States v. Baltimore & Ohio R. R., 293 U. S. 454;

United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499, 510, 511;

National Labor Relations Board v. Virginia Electric & Power Co., 314 U. S. 469, 479;

United States v. Caroline Freight Carriers Corp., 315 U. S. 475, 488;

Securities & Exchange Comm. v. Chenery Corp., 63 Sup. Ct. Rep. 454;

Cf. *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 197;

Powell v. United States, 300 U. S. 276, 289.

It should be noted that the findings here omitted go to the jurisdiction of the Board. They are "basic and essential findings" and not merely "the complete statement of the grounds of the Commission's determination" which, as was pointed out in *United States v. Baltimore & Ohio Railroad, supra,* though to be desired, is not necessary.

The decisions cited *supra* (p. 25) emphasizing the necessity of the Board's findings of fact, coupled with the plain words of the statute asserting that "the Board shall state its findings of fact", drive to the conclusion that the language of the statute is mandatory and the requirement of findings cannot be waived.

(b) The stipulation expressly reserves the question of jurisdiction. Paragraph 28 reads:

> "The Respondent, the Union, and Fred L. Young waive their respective rights to a hearing, as provided in Sections 10 (b) and 10 (c) of the Act and waive their respective rights to the makings of findings of fact and conclusions of law by the Board other than as to the question of whether the Act is applicable to the Respondent and to the employees of the Respondent under the facts herein set forth."

Paragraph 31 of the stipulation provides that the respondent will waive its rights to protest the validity and propriety of an enforcement order and decree thereon,

> "except that the Respondent reserves to itself the right to be heard in argument orally and by brief upon the facts herein stipulated before the Board and in any appropriate court on the sole issue of the applicability of the Act to the Respondent and to the employees of the Respondent, and the jurisdiction of the Board and such appropriate court to enter against the Respondent the order provided for in Paragraph 29 of this stipulation."

If the existence of unfair labor practices and their effect on commerce as defined in the Act constitute the test of the Board's jurisdiction, then there is in the stipulation no waiver of findings in respect thereto. If the facts set forth in the stipulation are insufficient to justify the exercise of jurisdiction by the Board, then that objection is still open to the Petitioner.

(c) The Circuit Court of Appeals' opinion is subject to the interpretation that the lack of proofs and findings was remedied by the agreement in the stipulation as to the form of the order that was to be entered. Emphasis is placed in the opinion of the fact that "the stipulation set forth the precise terms and contents of the order and that order was entered by the Board in *haec verba.*" But in this respect the Court's opinion is probably at variance with the decisions of the Supreme Court. The order does not supply the necessary findings. They cannot be supplied by implication.

Wichita Railroad & Light Co. v. Public Utilities Comm., 260 U. S. 48, 59;

Panama Refining Co. v. Ryan, 293 U. S. 388, 432;

Securities & Exchange Comm., v. Chenery Corp., 63 Sup. Ct. Rep. 454.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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